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91-1215

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MILDRED LOUISE BLAS, et al.,
Petitioners,

v.

GOVERNMENT OF GUAM, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. ADDITIONAL STATUTORY PROVISIONS INVOLVED

Guam Code of Civil Procedure §82. Original Jurisdiction.

The Superior Court shall have original jurisdiction in all cases arising under the laws of Guam, civil or criminal, in law or equity, regardless of the amount in controversy, except for causes arising under the Constitution, treaties, laws of the United States, and any matter involving the Guam Territorial income tax. [Enacted 1953; amended by P.L. 5-256, effective January 8, 1969; repealed and reenacted by P.L. 12-85, effective July 1, 1974.]

Title 5, Guam Code Annotated §6401. Claims Fund Created.

(a) Creation. The Government Claims Fund is hereby created and established as

an account which shall be separately identified and maintained by the Department of Administration. It shall consist of such funds as have been appropriated by the Legislature for the purpose of paying claims pursuant to this Chapter and unspent on the effective date of this Chapter and such appropriations made for this purpose thereafter.

(b) Reports by the Attorney General. Upon the settlement of any claim by the Attorney General, or final judgment in any action under this Chapter, the Attorney General shall designate which line agency incurred the liability which requires payment, and whether the liability arose under tort or contract.

Title 5, Guam Code Annotated §6404. Budgeting for Claims.

(a) The annual budget recommendations for governmental operations

transmitted from the Governor to the Legislature, or the annual budget of each autonomous agency, shall include an amount for each agency, line or autonomous, as the case may be, for payment of claims made pursuant to this Chapter and generated by the activities of such agency. The amount shall be at least equal to the arithmetic average of amounts paid out of the Government Claims Fund, or operating fund, as the case may be, on behalf of such line or autonomous agency, as determined and recorded by the Department of Administration, or by the autonomous agency, for the three fiscal years immediately preceding the year in which the recommendation is being made. The amounts requested may be decreased by the amount of insurance coverage purchased and in force.

Title 5, Guam Code Annotated §30101. Attorney General.

The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor for a term of four (4) years, or until the end of the term of the appointing governor, whichever is sooner, with the advice and consent of the Legislature. [The Governor may remove the Attorney General for cause.] The incumbent [1976] Attorney General need not be reappointed nor reconfirmed by the Legislature.

Title 5, Guam Code Annotated §30103. Common Law Powers of Attorney General.

The Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be

unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. The Attorney General may permit attorneys admitted to private practice in Guam or licensed collection agents to collect accounts or other obligations owing to the government of Guam, or to any agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by

its enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to private practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital.

II. SUMMARY OF ARGUMENT

Petitioner Blas sets forth no special and important reasons for granting certiorari. This case concerns the narrow issue of whether a territory is an agency of the United States under Fed. Rule of App. P. 4(a)(1). Blas has misconstrued the issue of this case when she asks this court to determine whether Guam is a federal agency for other purposes than under Rule 4(a).

The decision of the Ninth Circuit Court of Appeals dismissing petitioner's appeal is well founded in law. Guam is not an agency of the United States under Rule 4(a). Guam elects its own governor, collects a territorial income tax to finance itself, has its own Attorney General and there is no federal involvement in its litigation decision making processes.

III. ARGUMENT

A. BLAS' PETITION FAILS TO SET FORTH ANY REASON WHY THIS COURT SHOULD GRANT CERTIORARI.

Petitioner Blas asks this Court to decide whether Guam is an agency of the federal government for all purposes, yet nowhere in her petition is any reason set

forth as to why this case presents such a broad issue to the court. In reality, this case concerns a very narrow issue involving the interpretation of Federal Rule of Appellate Procedure 4(a)(1).

The Ninth Circuit Court of Appeals correctly stated the issue of this case in its opinion at 941 F.2d 778.

> The dispositive issue here is whether the appeal is untimely because it was not filed within the 30-day period provided in Fed. R. App. P.4(a)(1). Blas mantains that she is entitled to the 60-day period provided in that Rule for cases in which the United States or one of its agencies is a party.

Blas v. Guam 941 F.2d 778 (9th Cir. 1991).

There is no reason for this Court to grant certiorari on the narrow issue of whether Guam is an agency of the United States under Rule 4(a)(1).

Under Sup. Ct. R. 10.1:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Blas sets forth no special and important reasons for granting her petition for certiorari. The Ninth Circuit Court of Appeals decision does not conflict with the decision of any other Court's interpretation of Rule 4(a). This case presents an issue of first impression.

That this issue has not risen before is an indication that this case does not involve an important question of federal law. Only residents of the territories of the United States appealing to a Court of Appeals from a decision in which a territorial government is a party will be affected by the outcome of this case.

Petitioner's failure to file within the 30 day time period in this case appears to be a simple case of legal malpractice by petitioner's attorney.

B. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DISMISSING PETITIONER'S APPEAL IS WELL FOUNDED IN LAW.

Fed. Rule of App. P. 4(a)(1) provides, in relevant part:

> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry...

Because Blas filed her notice of appeal on the 60th day after the opinion of the District Court of Guam was entered, Blas'

notice of appeal is untimely unless the government of Guam is an agency of the United States under Rule 4(a)(1).

The purpose of allowing an additional 30 days for filing a notice of appeal when a government agency is a party is to provide sufficient time for routing the case to government officials who have responsibility for deciding whether or not to take an appeal. Wallace v. Chappell, 637 F.2d 1345, 1347 (9th Cir. 1981) (en banc).

Failure to file within these time periods is considered jurisdictional. National Indus., Inc. v. Republic Nat. Life Ins. Co., 677 F.2d 1258, 1263 (9th Cir. 1982).

Guam can be considered to be an instrumentality of the federal government. Ngiraingas v. Sanchez, 858 F.2d 1368 (9th Cir. 1988) aff'd, 495 U.S. 182

(1990), Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

However, an entity does not become a government agency under Rule 4(a)(1) simply because it is federally regulated. In Re Hoag Ranches, 846 F.2d 1225 at 1227 (9th Cir. 1988). "Nor is it dispositive that the organization is designated as a federal instrumentality..." In re Hoag Ranches, supra at 1227.

Hoag Ranches lists six factors to be considered in making a determination of whether an organization is a federal agency under Rule 4(a)(1):

> ...(1) the extent to which the alleged agency performs a governmental function; (2) the scope of government involvement in the organization's management; (3) whether its operations are financed by the government; (4) whether persons other than the government have a proprietary interest in the alleged agency and whether the

> government's interest is merely custodial or incidental; (5) whether the organization is referred to as an agency in other statutes; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act.

In Re Hoag Ranches, supra at 1227 - 1228.

Under the factors listed in Hoag Ranches, the government of Guam should not be considered an agency of the United States for purposes of Rule 4(a)(1).

(i) THE EXTENT TO WHICH THE ALLEGED AGENCY PERFORMS A GOVERNMENTAL FUNCTION; AND THE SCOPE OF GOVERNMENT INVOLVEMENT IN THE ORGANIZATION'S MANAGEMENT

While the government of Guam performs a governmental function this governmental function is akin to that of a state, not a federal agency.

As was stated in Ngiraingas v. Sanchez, supra at 1371:

> [2] Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counterintuitive. Guam seems more like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. See 48 U.S.C. §§1421-1428e.

The scope of the United States government involvement in the management of the government of Guam is very limited. Under Guam's Organic Act, 48 U.S.C. §1421 et seq., Guam's citizens elect a legislature, and a Governor. Pursuant to 48 U.S.C. §1424-1 the Guam Legislature has established a local court system. See GUAM CIV. PROC. CODE §82. This court and the Courts of Appeals have recognized that territorial governments like Guam have a form of inherent or common law sovereign immunity. Kawananakao v.

Polybank, 205 U.S. 349, 353 (1907) (Hawaii), and Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913) (Puerto Rico). Marx v. Guam, 866 F.2d 294 (9th Cir. 1989). The government of Guam is a body politic, not a federal agency.

(ii) WHETHER GUAM'S OPERATIONS ARE FINANCED BY THE U.S. GOVERNMENT

For the most part, the United States Government does not finance the operations of the government of Guam. Under Guam's Organic Act, 48 U.S.C. §1421i, the government of Guam collects territorial income tax in lieu of direct appropriation from the United States treasury. Bank of America, Nat'l. Trust & Sav. Assn. v. Chaco, 539 F.2d 1226 (9th Cir. 1976). Federal income taxes derived from Guam are held by the United States on account for the government of Guam. See 48 U.S.C. §1421(h).

Out of $372,405,747 in revenues received by the government of Guam in fiscal year 1989, only $47,676,051 or approximately 12.8% was received from the federal government. (Aflague affidavit, Appendix P).

The United States has no financial interest in the outcome of this appeal. Any money paid to satisfy petitioner's claim would be paid from a claims fund set up within the Department of Administration for the government of Guam. See GUAM CODE ANN. TITLE 5 §6404 et seq. The government of Guam is not financially dependent on the United States.

(iii) WHETHER PERSONS OTHER THAN THE GOVERNMENT HAVE A PROPRIETARY INTEREST IN THE ALLEGED AGENCY AND WHETHER THE GOVERNMENT'S INTEREST IS MERELY CUSTODIAL OR INCIDENTAL.

The people of Guam have a proprietary interest in the government of Guam.

It is their government operated by the officials they elect. It is a body politic. The United States interest in Guam is not proprietary.

(iv) WHETHER THE ORGANIZATION IS REFERRED TO AS AN AGENCY IN OTHER STATUTES.

Guam is generally not referred to as an agency of the federal government. It is generally referred to as a territory of the United States, e.g. 48 U.S.C. §1421a. In many federal statutes it is included under the definition of a state, e.g. 42 U.S.C. 8802, 42 U.S.C. §1301, and 15 U.S.C. §2052.

(v) WHETHER THE ORGANIZATION IS TREATED AS AN ARM OF THE GOVERNMENT FOR OTHER PURPOSES, SUCH AS AMENABILITY TO SUIT UNDER THE FEDERAL TORT CLAIMS ACT.

The government of Guam is not a governmental agency under the Federal

Tort Claims Act. See Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956).

In Harris, the court held that Saint Thomas, one of the Virgin Islands, is not a federal agency within the Federal Tort Claims Act but is an independent body politic.

> [7] We think it clear that by the Organic Act of June 22, 1936, Congress did the same with respect to the two municipalities which then constituted the Virgin Islands. That Act constituted each municipality into a body politic and juridic with perpetual succession and with power to acquire property, to possess, administer, and govern such property and to alienate or encumber it. It provided for a municipal council in each municipality with local legislative powers, a Legislative Assembly with legislative powers for the Virgin Islands as a whole, a Governor to act as chief executive of the Virgin Islands as a whole and of each of the two municipalities and a district court to exercise the judicial power of the Islands. As the Supreme Court said with

> respect to the Organic Act of Puerto Rico, "the purpose of Congress * * * was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system with defined and divided powers,--legislative, executive and judicial * * *." People of Porto ico v. Rosaly y Castillo, 1913, 227 U.S. 270, 276-277, 33 S.Ct. 352, 354.
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> * * *
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> It is thus clear that the Municipality of St. Thomas and St. John in the unincorporated territory of the Virgin Islands was a body politic quite distinct from the Government of the United States and that it had attributes of sovereignty which had been delegated to it by the Government of the United States but which were distinct from the powers of that government. It is equally clear that the municipality was endowed by Congress with the sovereign power to acquire, administer, govern and alienate property and that such property must be regarded as belonging to the municipality rather than the United States.

Harris v. Boreham, supra, at 114.

Recently, the Ninth Circuit Court of Appeals applied the Hoag standard in

determining that the Trust Territory of the Pacific Islands is an agency of the federal government under Fed. R. App. P. 4(a)(1) in Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401 (9th Cir. 1989). The Court found that the Trust Territory was a federal agency because

> It performs a governmental function; the President appoints the TT High Commissioner, it executive, with the advice and consent of the U.S. Senate; its operations are largely paid for by the U.S. Treasury; no other persons have a proprietary interest in the TT government; and the U.S. government's interest is not "merely custodial." Although the TT government is represented by private counsel for this appeal, the litigation decision-making process includes the U.S. government.

876 F.2d at 1405. In contrast, Guam's Governor and Legislature are both elected by the citizens of Guam and the judiciary is appointed by the Governor with the consent of the Guam Legislature. See

48 U.S.C. §§1422, 1423, and GUAM CIV. PROC. CODE §§81, 82. The operation of the government of Guam is largely paid for by the revenues raised on Guam and the litigation decision-making process does not include the United States government.

No United States attorney is involved in representing the government of Guam on this matter. No United States official is being consulted in this case. The Attorney General of Guam, as part of the executive branch established in Guam's Organic Act, is representing the government. See GUAM CODE ANN. TITLE 5, §§30101, 30103.

To allow an additional 30 days for filing a notice of appeal in this case would be inconsistent with the purpose of Rule 4(a)(1). The purpose of allowing an additional 30 days for filing a notice of appeal when a government agency is a

party is to provide sufficient time for routing the case to federal government officials who have responsibility for deciding whether or not to take an appeal. Wallace v. Chappel, supra at 1347.

There is no reason to grant the government of Guam an additional 30 days to consult with federal officials when there are no federal officials being consulted.

IV. CONCLUSION

There are no special and important reasons to grant petitioner's petition for a writ of certiorari. The issue in this case is a very narrow one and is unlikely to arise again.

The government of Guam is an independent body politic and not a federal

agency under Fed. R. App. P. Rule 4(a)(1). Blas' appeal was properly dismissed for failing to file her notice of appeal within 30 days after the date of entry of the opinion of the Guam District Court.

Petitioner's petition for writ of certiorari should be denied.

Dated this 13th day of February, 1992.

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